SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1859.

WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM PACKET COMPANY, Plaintiff in Error,
vs.
FREDERICK E. SICKLES AND TRUEMAN COOK.

No. 180.

BRIEF FOR PLAINTIFF IN ERROR.

This was an action of assumpsit brought in the circuit court of the District of Columbia, by the defendants in error against the plaintiffs in error, and in the court below as well as in this court turned mainly upon the doctrine of estoppel.

By the first count in their declaration, the defendants in error declared "*that whereas, heretofore, to wit, on the* 18*th June, in the year* 1844," they, "being *the owners* of the patent right of a certain machine called 'Sickles' cut off,' designed to effect a saving in the consumption of fuel by steam engines," and the plaintiffs in error being the owners of a certain steamboat, &c., it was mutually agreed by and between them, &c., and after setting out the alleged agreement at length, (pages 1, and 2,) allege that, afterwards, to wit, on the 19th March, 1846, they brought a suit in the circuit court, &c., and that the first count in their declaration "was on said special contract hereinbefore set forth;" that the said suit was tried by a jury; "that one of the issues joined in the said cause was as to the existence of the said contract as set forth in the first count in the declaration" in that court; that the jury rendered their verdict on the said first count, &c., founded on the said contract, &c.; and the defendants in error averred "that the said verdict of the jury, and judgment of the court thereon, established said contract between said plaintiffs and defendants, and that the said defendants are thereby stopped to deny the same." (See pages 4, 5, 6.)

By the second count, it is averred that, "*heretofore, to wit, on the* 18th *June*, 1844," it was mutually agreed, &c., setting out a contract in nearly the same terms as that mentioned, but refer-

THOS. MCGILL, printer.

ring to no suit brought thereon, (p. 6, 7, 8,) and then followed common counts for money had and received, &c. The contracts laid in the special counts, were to the effect that the plaintiffs below being owners of the patent for Sickles' cut-off for saving fuel in the working of steam engines, and the defendants below being the owners of a certain steamboat, it was agreed between them that the said plaintiffs should attach to the engine of the said defendants one of their machines, and that the said defendants should pay for the use thereof $\frac{3}{4}$ of the saving in fuel produced thereby, the payments to be made from time to time when demanded; that an experiment should be made in manner set forth in the counts, to ascertain what was the rate of saving, which should govern during the continuance of the contract, which was so long as the patent right and the said steamboat should last, and averred that the experiment had been made, and the rate of saving ascertained, &c.

The plaintiffs in error pleaded *non assumpsit*, on which issue was joined. The cause came on to be tried on the third Monday of November, 1858, and the plaintiffs having first entered a *non pros.* on the common counts, a jury was empannelled to try the issue "on the first and second counts in the declaration," (p. 11,) who found a verdict for the plaintiffs below for $\$16{,}388\frac{25}{100}$, and the court gave judgment for the same and costs, from which judgment the present writ of error is brought.

In the court below, the defendants in error produced nothing to show any contract between them and the plaintiffs in error, except the proceedings in a former suit mentioned in their first count, and the court admitted these proceedings in evidence after an objection made thereto by the plaintiffs in error, and the said plaintiffs excepted. See first bill of exceptions, (p. 12.)

And afterwards, the defendants in error, having given evidence of the quantity of wood used, &c., insisted that the proceedings set out in the first bill of exceptions operated as an estoppel upon the plaintiffs in error. The court holding this to be true, rejected all evidence offered by defendant to prove that there was no such contract made as set out in the first and second counts of the declaration, or to disprove any one of the averments made in the first count of the declaration in the former suit, or to show that no saving of the wood had been effected, &c. (See 5th bill of exceptions for the particulars of this evidence.)

The court, therefore, held that the proceedings offered were not only evidence, proper and admissible, but conclusive against the plaintiffs in error as an estoppel.

We submit that the court below erred in holding these proceedings proper evidence, for there was no judgment or verdict shown. The docket entries admitted by the court on this point, are in these words:

"22d November, jury found verdict for plaintiffs. Damages $1,695 75, with interest from 16th March, 1846. Verdict rendered 7th December. 14th December, judgment for plaintiffs on the first count in the declaration."

This entry on the docket was the whole evidence of a verdict or judgment offered on the trial, (p. 22.) (It is true the clerk has added to the record how the docket entries *will appear* when extended—that is, what the verdict and judgment will be when the record shall be made up, but we have to do with what appeared on the trial, and not what will, in the opinion of the clerk, hereafter appear, p. 26;) and, we submit, there was no evidence of a verdict or a judgment. There was no verdict, but a mem. or entry or minute, from which a verdict might afterwards be drawn up. But if there had been a verdict in full, properly entered up, it could not be offered as evidence without showing the judgment.

But a judgment can only be shown by the production of an examined copy, or an exemplification of the judgment entered of record, or in the same court by the production of the judgment itself.

Tuthill v. *Davis*, 20 *J. R.* 285. *Phil. on Ev.* 384.

It cannot be proved by the judgment book, although the judgment roll may not have been made up; and though the person interested in showing the judgment be no party to the record.

Ayrey v. *Davenport*, 2 *New. R.* 474.

Nor by the minutes kept from which a judgment is to be made up.

Wade v. *O'Neil*, 3 *Dev. R.* 423.
U. S. v. *Levering*, 4 *Wash. C. C. R.* 698.
Ferguson v. *Harwood*, 7 *Cr.* 408.
Lowry v. *Cady*, 4 *Verm. R.* 504.
Seaton v. *Cordray*, 1 *Wright's* (*Ohio*) *R.* 102.
Vaughan v. *Phebe*, 1 *Mart. & Yerger*, 24, 25.
Sheldon v. *Frink*, 12 *Pick. R.* 568.

But if there was no judgment shown, then there was no evidence of a verdict, for a verdict is of no force until followed and consummated by a judgment.

The nisi prius record, with the postea endorsed, is not evidence of the verdict; the verdict must be entered of record, and the judgment thereon, and then a copy of the record will be proper evidence of the verdict.

Fisher v. *Kilchingonar*, *Willes*, 368.
Rex v. *Page*, 2 *Esp. N. P. C.* 649—*note.*
Pitton v. *Walter*, 1 *Str.* 162.

And this, although the entry of the verdict were full and

formal; but in our case, such minutes of a verdict, if inserted in a record otherwise perfect, would not be a verdict at all.

If verdict pass for the plaintiff, and he will not enter his judgment, the defendant may by motion to the court oblige him to do it, to the end that he may plead it to another action. *Latch.* 216. 1 *Danv.* 722. *Palmer*, 281.

This would be absurd if defendant might plead the verdict without the judgment. Now, what is here implied in the phrase "enter his judgment?" Judgments must not only be signed, but entered of record; before which they are no judgments. 2 *Lill.* 103. And it has been already shown that the entering of a judgment is enrolling it, by which the record is complete, and passes beyond the control or reconsideration of the court.

From which cases it is evident that the rule is the same in the courts of England as in the courts of this country, which is this: that a judgment only exists, and therefore only can be shown by the record thereof where finally reduced to its ultimate form, according to the course of the court, whether that be enrolment, insertion in a book kept for that purpose, or otherwise; and whilst there is something to be done, in order to make the judgment hereafter assume that form, there is no judgment in law. For until that is done, there is no final judgment settling the rights of the parties, and putting the proceedings beyond the control of the court. Until that is done everything is *in fieri.* The court may grant a new trial, arrest the judgment, &c. See opinion, Gaston, J., in *Goodhead* vs. *Wills*, 4 *D. & B.* 271.

From all which, it is respectfully submitted that the court below erred in receiving the proceedings in evidence at all; but if they were admissible, then we contend:

That the court manifestly erred in holding them to amount to an estoppel. That the court did so hold is evident, because it appears, by the 5th bill of exceptions, (p. 14,) that the plaintiffs below, having given the evidence set forth in the previous bills of exceptions, and in the 6th bill of exceptions, and having closed their case, "and insisting that the proceedings set out in the first bill of exceptions (to wit: the proceedings in the former case, p. 12) operated as an estoppel on all the matters recited in the first and second counts of the declaration, the court thereupon refused to allow the defendants to offer evidence to disprove all or any of the matters so recited, and particularly to prove that no such contract was made as the plaintiff had in those counts alleged;" and because also the court having, as appears by the said 5th bill of exceptions, excluded all evidence in reference to the amount of saving, if any, did, as appears by the 7th bill of exceptions, instruct the jury upon the prayer of the plaintiffs below, that they were bound by the rate of saving

in the first count of the declaration in the former trial alleged. Now, the plaintiff *below had offered no evidence of any contract whatever*, except the proceedings in the former suit, and therefore, unless those proceedings estopped the defendant below, he must have been entitled to disprove the allegations in the declaration, even if those proceedings were rightfully received in evidence.

Now, these proceedings could not constitute any estoppel:

First, For the reasons already assigned why they could not be admitted as evidence.

Secondly, Because, supposing the verdict and judgment to have been complete and formal, no estoppel could in law result therefrom.

Lord Coke, after stating that estoppels may be either by matter of record, by deed indented, or by matter in *pais*, lays down certain rules as to all estoppels, the second of which is in these words:

"Every estoppel, because it concludeth a man to speak the truth, *must be certain to every intent*, and *not to be taken by argument or inference.*"

Therefore, where the estoppel is alleged to consist of a verdict and judgment in a *former suit*, it must be shown by the record that the *very point* which it is sought to estop a party from contesting was distinctly presented by an issue, and expressly found by the jury. It is confidently believed that no case of an estoppel by verdict and judgment in a former action can be found which does not meet this test, and hence no estoppel was ever sustained as arising out of a judgment in an action of assumpsit, or other action on the case, tried upon the general issue, because in no such action can any precise point be made and presented for trial by a jury. It may be collected by inference—strong, irresistible; but it cannot be brought out, separated from other matters, and expressly found. It will fall under the remark of the court, where, in an action "of trespass *de bonis asprotatis*, the defendant pleaded that the plaintiff 'never had any goods,' and the court said 'it is an infallible *argument* that the defendant cannot be guilty, but it is no plea.'" *Dyer*, 43, *a. pl.* 19.

For this we cite the case in 3 East. 346, of *Outram* v. *Morewood*, which was cited with approbation by this court in *Richardson* v. *City of Boston*, 19 *How.* 267. In his elaborate judgment in that case, Lord Ellenborough shows that where, in the former suit, the *precise point* was once *put in issue*, and a verdict found upon it, the verdict is conclusive; and in that case, as upon a trial in a former action of trespass, the pleadings had resulted in one issue, to wit, whether certain coal mines (in question in

the suit then before him) *were parcel of the coal mines bargained and sold*, on which the jury found that *they were not parcel, &c.*, it was held that defendant was estopped to aver that they were parcel. And the whole opinion shows that there could be no estoppel by verdict under any other circumstances. And that this is what the court there intended to express and did hold, is proved by his Lordship's statement of a case cited by counsel in the argument.

At page 183 he says:

"As to the other case relied on by the plaintiff, of *Sir Frederick Evelyn v. Hayes*, which was a second action for obstructing a watercourse, tried before *Lord Mansfield* upon a plea of *not guilty*, and where a verdict for the plaintiff in another action brought against the defendant for another obstruction to the same watercourse was given in evidence, *Lord Mansfield* held, very properly, that the plaintiff *had not obtained such a determination of his right as the law considered as conclusive.* It could only be conclusive *upon the right*, if it could have been used, and were actually used, *in pleading*, by way of estoppel, which it could not be *in that case;* first, Because no issue was taken in the first action upon any *precise point;* which is *necessary to constitute an estoppel thereupon in the second action.* Secondly, It was not even *pleaded* by way of estoppel in the second action, but only offered as *evidence* on the *general issue;* and in order to be an estoppel, it must have been, as already observed, *pleaded as such by apt averment.*"

This case of Evelyn v. Hayes, decided by Ld. Mansfield, and approved by the Court of King's Bench, is conclusive of the present question. *There* the plaintiff declared for obstructing a watercourse, and on *not guilty* pleaded obtained a verdict, his title to the watercourse being necessarily involved in the issue. *Here* in the former suit upon non assumpsit the plaintiff below obtained a verdict, his title to maintain the action, to wit, the contract alleged, being necessarily involved in the issue.

There a second action was brought for another obstruction to the same watercourse, and upon the trial on *not guilty* pleaded the plaintiff offered the record of the former suit in evidence; and it was held that the former verdict was not conclusive of the plaintiff's title. *Here* the plaintiffs below brought a second action to recover damages for a further demand as due on the same contract, and on non assumpsit pleaded they offer to the jury the proceedings in the former action; and the court below held them conclusive of the plaintiff's title to maintain the action, to wit, the contract alleged in the former suit. It is impossible, as we conceive, to distinguish the cases; and if Ld. Mansfield and the

Court of King's Bench were right, the court below, in our case, was wrong. His Lordship, in giving the reasons for his opinion, altogether sustains our position that a question involved *with other matters, in a general issue*, cannot be concluded as by estoppel—that an estoppel can arise only where there is a verdict upon a "precise point," and then it can only be availed of when pleaded as an estoppel—and that, whether the party could have so pleaded it and omitted to do it, or from the nature of the action could not so plead it.

In such a case no effect can be given to the proceedings but as evidence to the jury, according to Ld. Mansfield, the Court of King's Bench, and this Court in the before-cited case of Richardson v. Boston. No case—certainly none of as high authority—can be produced by which this ruling is contradicted; no case of an estoppel by verdiet and judgment allowed, except where it was pleaded with apt words as an estoppel; and certainly no case where it was allowed to operate as an estoppel when offered in evidence, *unless the verdict and judgment were upon the precise point raised in pleading and expressly found.* The most, therefore, which could have been claimed was that these proceedings were evidence—persuasive evidence—possibly, *prima facie* evidence, to be submitted to the jury. But *evidence* is not *proof;* it may be met by other evidence. Persuasive evidence is not *compelling*, and that which is prima facie may be repelled; and therefore the court erred in ruling out our evidence.

The effect of a recovery as a bar to a future action for the *same thing*, and as an estoppel, must not be confounded. Had the plaintiff below brought an action to recover damages for the same use of the patent for which he recovered in the former suit, the judgment would no doubt be a *bar;* for there the recovery operates by itself as *a bar to the action*, and not by way of *estoppel.* But it is the peculiar office of a proper estoppel to conclude a party in a future action brought to recover something ELSE, on the *same title*, from disputing *that title.* A matter may be a conclusive bar, as in an action of debt, a plea of payment or release, but no estoppel; for an estoppel always closes the mouth of the opposite party from alleging or denying something—the bar takes what the opposite party alleges, and shows that, as alleged, it is of no force to sustain his action or defence. He who insists upon an estoppel, demands judgment if his adversary shall be allowed to assert what he pleads. The plea in bar alleges matter which takes from the opposite party the benefit of his pleading, and demands judgment if the plaintiff can or ought to have his action, &c. The former denies the *right to plead*—the latter confesses the matter pleaded, and avoids its effect by other

matter alleged. The distinction is apparent, and is briefly noticed by Lord Ellenborough in the case above cited of Outram v. Morewood. (See page 178.)

But there are other grounds why the court erred in giving effect to these proceedings, as conclusive of anything against the defendant.

The declaration in the first suit states the contract to have been made "heretofore, to wit, on the 18th day of June, 1844," and the declaration in the present suit, in the first and second counts, states the contract in the same manner, as made "heretofore, to wit, on the 18th day of June, 1844."

Now, it is very clear that, though the day, month, and year must be alleged on which each material fact took place, yet it is not necessary to *prove* the fact to have taken place at the time stated, *if it be stated under a videlicit;* and the plaintiff may prove anytime before the commencement of the suit. To this rule there are these exceptions:

First. In suits on bills of exchange, promissory notes, &c., the *true date* must be given.

Second. Deeds must be pleaded according to their date or time of delivery.

Third. Records must be pleaded as of the *true* term.

Fourth. "Where the precise date of any fact is necessary to ascertain and determine with precision the cause of action, any, the slightest, variance between the declaration and evidence will be fatal," as in debt, *quitam*, for usury, the agreement to forbear and give time of payment, must be precisely alleged, and proved as alleged.

Carlisle v. *True*, *Cowp.*, 671.
Tate v. *Willing*, 3 *T. R.*, 531.
Archbold Civil Pleading, 115–121.
1 *Chitty Pl.*, 257.
Stephenson Pl., 392.

Now, if the plaintiff had left out his *videlicit*, and stated the time directly, whereby the time would have become material, though not so in itself, and he would have been bound to prove the time laid, there would have been some ground to contend that the same contract was sued upon in each declaration. How far available this ground might have been, it is not necessary to consider.

But clearly upon the pleadings in the two suits there is *in law* no certainty or reasonable inference of identity. The allegation in each declaration is in law that *sometime before the commencement of the suit* a contract was made, &c. The declaration in the last suit would have been supported by proof of a contract

made after the determination of the first suit, as well as at any time before. The finding of the jury in the first suit at most found a contract sometime before action brought. There was no proof offered of any identity of the contracts alleged in the two declarations—nothing but the two declarations.

In the first count, the plaintiff below, after stating the contract, alleges that he brought suit upon the contract and recovered, and that thereby the defendant below was estopped—being a curious count, by which the plaintiff below, by way of anticipation, undertakes to plead an estoppel to a defence which might be afterwards set up. This, we submit, is idle and impertinent—will not be noticed, nor affect the subsequent proceedings at all. This plainly appears from *Sir Ralph Bovey's* case, Ventris 217. The case is thus stated: "In debt upon an escape the plaintiff set out a *voluntary* escape. The defendant *protesting* that he did not let him voluntarily escape, *pleads* that he took him upon fresh pursuit, to which it was demurred, *because he did not traverse the voluntary escape*, and resolved for the defendant; for it is *impertinent* for the plaintiff to allege it, and *noways necessary* to his action. 'Tis *out of time* to set it forth in the declaration, but it should have come in the replication. *''Tis like leaping* (as Hale Ch. J. said) *before one come to the stile.'* As if in debt upon a bond the plaintiff should declare that at the time of sealing and delivering of the bond the defendant was of full age, and the defendant plead *deins age* without traversing the plaintiff's allegation." See also Co. Litt. 282, b.

Indeed, this is but an example under Lord Coke's rule, laid down in Co. Litt. 303, a, in these words: "The *order* of good pleading is to be observed, which being inverted, great prejudice may grow to the party, tending to the subversion of the law, *Ordine placitandi servato, servatur et jus, &c.*

But if this allegation is not to be deemed idle and impertinent, so as to need no traverse, then, like the rest of the declaration, it was in issue on the plea of *non assumpsit*. And the plaintiff's allegations of former suit and judgment, and that the contract was the same, are to be proved by him. But no proof is offered, save the former proceedings.

But further, the declaration contained, and the trial was had on, two counts. In law these are supposed to be on different contracts. In the second there was no averment of a suit having been brought on that contract. Yet the court applied the estoppel to both counts, and refused to hear evidence to disprove the contract alleged in either. This is a fatal objection to holding the proceedings an estoppel, which we are now considering, and not their admission as evidence.

But further, it is a rule that all estoppels must be reciprocal, and bind both parties. *Co. Litt*, 352; or what is alleged as estoppel must, if found the other way, have estopped the other party. As in the case of *Outram* v. *Morewood*, the question was, *Are certain mines parcel of certain lands?* If found one way, it estopped the plaintiff; if the other, the defendant. So if *liberem tenementum* be pleaded; found either way, it makes an estoppel. But, "if one taketh a lease of his own land of an infant, or *feme covert*, by indenture, this is no estoppel, for in estoppels *both parties* are to be estopped, which the infant and *feme covert* are not." *Jones* v. *Landon*, *Cro. Eliz.*, *page* 37.

But it is clear that no such mutuality could be in our case. If the jury in the first action had found for the defendant on the plea of *non assumpsit*, and the present action had been brought, to recover a further sum subsequently accrued, could the defendants below have used that verdict as an estoppel upon the allegation of the contract in the present declaration? Surely not. For, to assign no other reason, the jury would have found the same verdict, whether there was a failure to prove the contract, or payment were proved, after the contract was shown, or a release of the damages for the breaches of the contract before the commencement of the first action. And if in either of three alternatives the verdict would have been the same, it cannot appear from the verdict that either one of them was its foundation.

Therefore, there being no mutuality, there is no estoppel.

Finally. By the 2d bill of exceptions, (p. 12,) it appears that the plaintiffs below offered, and by the court were allowed, to give in evidence certain documents, which are set forth on pages 17, 18, 19, 20, and 21 of the record. These papers consisted of copies of the patent to Sickles for the cut-off, dated May 20, 1842, and of articles of agreement between Sickles and Cook, the other plaintiff below, dated 11th January, 1842, whereby Sickles agreed to assign to Cook a half interest in the patent when obtained.

Now, the estoppel alleged in the court below, if available at all, was an estoppel on the defendant to deny as well the joint ownership alleged in the declaration as the other matters therein alleged. Therefore, when the plaintiff below gave this evidence, he opened the whole; for it is submitted that a party who alleges an estoppel, must allege it as against *all* that it estops, and cannot rely upon his estoppel as to part, and go to proofs as to other parts, and it is confidently believed that no such case can be found anywhere.

But further, if the party can do so, he must do it in pleading,

if his estoppel be asserted by plea, or, *in pais*, if he offer his matter of estoppel in evidence. Now, here it appears by the 5th bill of exceptions, (p. 14,) that the plaintiffs below insisted upon the proceedings in the former suit "as an estoppel, as to all and singular the matters recited and averred in the first and second counts of their declaration," except the amount of wood used. When, therefore, they offered evidence of the joint ownership, they set the whole matter at large, for it was inconsistent with and contradictory to the estoppel alleged, &c.

For all and each of which erroneous rulings of the court below, we submit that the judgment should be reversed.

GEO. E. BADGER,
J. M. CARLISLE,
For Plaintiffs in Error.